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6 THE HONORABLE BRIAN A. TSUCHIDA
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12 UNITED STATES DISTRICT COURT
13 WESTERN DISTRICT OF WASHINGTON
14 AT SEATTLE
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17 CHRISTOPHER J. HADNAGY, an individual; and SOCIAL-ENGINEER, LLC,
18 a Pennsylvania limited liability company,

19 Plaintiff,

20 v.

21 JEFF MOSS, an individual; DEF CON
22 COMMUNICATIONS, INC., a Washington corporation; and DOES 1-10; and
23 ROE ENTITIES 1-10, inclusive,

24 Defendants.

25 No. 2:23-cv-01932-BAT

26 **DEFENDANTS' MOTION TO EX-
CLUDE PLAINTIFFS' DAMAGES
EXPERT BEN THOMAS**

Noted for Consideration: April 4,
2025

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1 **I. INTRODUCTION**

2 The facts of this case are simple. Defendants Jeff Moss and Def Con Commu-
 3 nicipations, Inc. (collectively, “Defendants”) host an annual information security con-
 4 ference. Plaintiffs Social-Engineer, LLC and Christopher Hadnagy (collectively,
 5 “Hadnagy”) regularly attended the conference. Defendants banned Hadnagy in Feb-
 6 ruary 2022 for extensive violations of Def Con’s code of conduct and announced the
 7 ban on Def Con’s website (the “Transparency Report”). In January 2023, Def Con
 8 provided an update on the ban (the “Transparency Update”). Hadnagy filed this law-
 9 suit, alleging the Transparency Report and Transparency Update cost Hadnagy mil-
 10 lions of dollars in damages. Defendants now move to exclude Ben Thomas, Hadnagy’s
 11 damages expert, for several reasons.

12 ***First***, Mr. Thomas’s expert testimony is riddled with unsupported assump-
 13 tions. For his lost business value analysis, Mr. Thomas assumes with no factual basis
 14 that the Transparency Report destroyed Social-Engineer as a going concern and val-
 15 ues the business at ***zero***. This is nonsensical on its face, as Social-Engineer’s profit
 16 and loss statements show that Social-Engineer’s revenues ***increased*** in the year fol-
 17 lowing the Transparency Report. Mr. Thomas also opines that Defendants caused
 18 Social-Engineer’s ostensible financial harm, but his own *ipse dixit* is the only basis
 19 for this conclusion; he does not tie Social Engineer’s putative financial harm to De-
 20 fendants through any kind of reliable principle or method.

21 ***Second***, Mr. Thomas’s damages calculations are not the product of reliable
 22 principles and methods under Rule 702(c), as he fails to meaningfully explain his
 23 methodology. Instead, he simply chose the “market approach” to calculate Social-En-
 24 gineer’s ostensible lost business value and arbitrarily selected fourteen “comparator”
 25 transactions without any objective criteria for how or why these transactions should
 26 be comparators. Worse, Mr. Thomas includes *irrelevant* components in his

1 calculations for loss of income, such as the salary of Hadnagy's *wife* and Hadnagy's
 2 separate income from a non-party entity. Mr. Thomas fails to adhere to basic econo-
 3 mist standards.

4 ***Third***, Mr. Thomas did not review any of the underlying contracts with
 5 Hadnagy's customers in calculating Hadnagy's alleged losses. Instead, Mr. Thomas
 6 relied upon a self-serving spreadsheet that Hadnagy himself prepared. Mr. Thomas
 7 did not conduct his own independent investigation or review of the contracts; did not
 8 inquire into why the contracts were not performed (in fact, he ignored Hadnagy's ***own***
 9 ***comments*** that provided alternative reasons for why the contracts were lost, such as
 10 [REDACTED]); and did not even bother to verify whether the data Hadnagy provided
 11 was accurate. Experts cannot simply parrot a party's manufactured evidence into the
 12 record without verification or independent analysis.

13 The Court plays a crucial gatekeeping role under Rule 702; it must "make cer-
 14 tain that an expert . . . employs in the courtroom the same level of intellectual rigor
 15 that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v.*
 16 *Carmichael*, 526 U.S. 137, 152 (1999). Mr. Thomas's report and testimony fall far
 17 short of the "intellectual rigor" that Rule 702 demands, and the Court should exclude
 18 him as a result.

19 **II. HADNAGY'S EXPERT**

20 Mr. Thomas is a certified public accountant, and his Report's analysis, which
 21 amounts to about five pages, provides only one conclusory opinion:

22 Based on the information provided as of the date of this report, it is my
 23 opinion that Plaintiffs have incurred, or will incur, economic damages
 24 of \$2,270,186 due to the actions of the Defendants, such as the release
 25 of the Transparency Report on February 9, 2022 and subsequent Up-
 26 date released on January 13, 2023. Economic damages are comprised
 of \$578,186 in past lost income, which is inclusive of extra expenses,
 and \$1,692,000 in lost business value.

1 Declaration of Matthew Mertens (“Mertens Decl.”) Exhibit A (“Expert Report”)¹ ¶ 7.
 2 Because that opinion cannot survive scrutiny under Rule 702, it ought to be ex-
 3 cluded wholesale.

4 **III. LEGAL STANDARD**

5 In order to be admissible under Federal Rule of Evidence 702, expert testimony
 6 must meet five requirements: (1) be provided by a qualified expert, (2) be helpful to
 7 the trier of fact, (3) be “based on sufficient facts or data,” (4) be “the product of reliable
 8 principles and methods,” and (5) be the result of reliably applying “the principles and
 9 methods to the facts of the case.” Fed. R. Evid. 702.

10 As the Supreme Court explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, “[t]he adjective ‘scientific’ implies a grounding in the methods and procedures of
 11 science.” 509 U.S. 579, 590 (1993). “Similarly, the word ‘knowledge’ connotes more
 12 than subjective belief or unsupported speculation.” *Id.* Expert testimony need not “be
 13 ‘known’ to a certainty.” *Id.* But, critically, “an inference or assertion must be derived
 14 by the scientific method.” *Id.* In short, there must be indicia of “evidentiary reliabil-
 15 ity—that is, trustworthiness.” *Id.* at 590 n.9 (emphasis omitted).

16 The Court must act as a “gatekeeper” by assessing the soundness of the ex-
 17 pert’s methodology to ensure that jurors are not provided irrelevant or unreliable
 18 testimony. *Kumho*, 526 U.S. at 137. This “gatekeeping function requires more than
 19 simply ‘taking the expert’s word for it.’” *Id.* (citing *Daubert v. Merrell Dow Pharms., Inc. [Daubert II]*, 43 F.3d 1311, 1319 (9th Cir. 1995)). A district court cannot allow an

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¹ Defendants are filing a redacted version of this Motion, a redacted version of Exhibit A (the Expert Report), and sealing in its entirety Exhibit B (the testimony of Mr. Thomas) and Exhibit C (the spreadsheet created by Hadnagy) solely because Hadnagy designated this information as “CONFIDENTIAL” under the parties’ Stipulated Protective Order. Defendants do not take a position on whether sealing these documents satisfies the Ninth Circuit’s “compelling reasons” standard for sealing. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This is Hadnagy’s burden under LCR 5(g)(3)(B).

1 expert to offer opinions based on “unsubstantiated speculation and subjective beliefs.”
 2 *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997).

3 The proponent of the expert has the burden of proving admissibility. *Lust By*
 4 & *Through Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

5 **IV. ARGUMENT**

6 **A. Mr. Thomas’s Methodologies Are Unreliable.**

7 Mr. Thomas’s opinions are unreliable for several reasons, each of which serve
 8 as separate, independent grounds for excluding his expert testimony.

9 **1. Mr. Thomas’s calculations for loss of business value are
 10 unreliable.**

11 **a. Mr. Thomas fails to explain his selection of
 methodologies.**

12 The Report is unreliable because Mr. Thomas fails to adequately explain his
 13 methodology for valuing Social-Engineer. Mr. Thomas acknowledges that there are
 14 “three approaches available when valuing a closely held business interest: the cost
 15 approach, the income approach, and the market approach. While all three have been
 16 considered, I selected the market approach, specifically the guideline transaction
 17 method.” Expert Report ¶ 23. But the Report fails to explain **how** Mr. Thomas “con-
 18 sidered” these other two approaches, **what** the results were of these other two ap-
 19 proaches that he did not select, and most importantly, **why** Mr. Thomas selected the
 20 market approach as opposed to the other two approaches. *See id.* Mr. Thomas fails to
 21 explain his methodology in his deposition.

22 Q. And why is the income approach not appropriate?

23 A. I wouldn’t say it’s necessarily not appropriate. It’s just I didn’t select it.
 24 I selected the market approach.

25 Q. Did you actually perform an analysis under it, or did you just do some
 26 numbers and say, “I think the market approach is better”?

1 A. No. I didn't necessarily say it's better. I just – it's a – it's a method that
 2 I did select versus running a capitalization of earnings method.

3 Mertens Decl. Exhibit B ("Thomas Dep.") 124:16–125:2.

4 An expert cannot simply select one methodology over another without expla-
 5 nation or support for that selection. *See Open Text S.A. v. Box, Inc.*, No. 13-CV-04910-
 6 JD, 2015 WL 349197, at *3 (N.D. Cal. Jan. 23, 2015) ("This 'I like it—I like it not'
 7 petal-plucking exercise is hardly the grist of admissible expert opinion."); *see also*
 8 *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137 (1997) ("Nothing in either *Daubert* or the
 9 Federal Rules of Evidence requires a district court to admit opinion evidence that is
 10 connected to existing data only by the *ipse dixit* of the expert."). Mr. Thomas's failure
 11 to explain (1) his "consideration" of the other methodologies, (2) the results of those
 12 other methodologies, (3) his rejection of those other methodologies, and (4) his selec-
 13 tion of the market approach renders Mr. Thomas's opinion unreliable.

14 **b. Mr. Thomas fails to explain his selection of
 15 comparable transactions or provide his data.**

16 The same flaws apply to Mr. Thomas's application of the market approach,
 17 specifically his selection of "14 guideline transactions over the relevant historical pe-
 18 riod." Expert Report ¶ 24. To calculate lost business value, Mr. Thomas selected four-
 19 teen transactions (i.e., sales of companies) with allegedly similar "financial and oper-
 20 ating characteristics" to Social-Engineer and applied a valuation multiple derived
 21 from these fourteen transactions. *Id.* These fourteen transactions took place between
 22 2010 and 2023. Thomas Dep. 134:10–20.²

23 Although Mr. Thomas claims that these companies are "sufficiently compara-
 24 ble to Social-Engineer," Mr. Thomas does not provide any support or explanation for

25 ² Mr. Thomas testified that he selected transactions from as early as 2010—over
 26 fourteen years ago—because "in my mind, that's relatively recent. I wouldn't call
 that a stale transaction." Thomas Dep. 136:7–12.

1 this bald assertion. *See Expert Report ¶ 24; Daubert II*, 43 F.3d at 1316 (“[An] expert’s
 2 bald assurance of validity is not enough. Rather the party presenting the expert must
 3 show that the expert’s findings are based on sound science, and this will require some
 4 objective, independent validation of the expert’s methodology.”). The Report does not
 5 explain *how* Mr. Thomas selected and evaluated these fourteen transactions, or *what*
 6 *criteria* he used to determine that these fourteen transactions (as opposed to other
 7 potential transactions) are appropriate comparators for Social-Engineer. *See Expert*
 8 *Report ¶¶ 24–25.* The Report also fails to disclose the source of its data for these
 9 fourteen transactions. *See id.*

10 Mr. Thomas also does not explain, let alone even disclose in his Report, that he
 11 “deselected” transactions that he deemed to be “irrelevant.” Thomas Dep. 135–136.
 12 Mr. Thomas’s conclusory assertion that these fourteen transactions are comparable—
 13 and that other transactions that were *not* disclosed were not—is insufficient to sat-
 14 isfy the standards of expert testimony. *See Daubert II*, 43 F.3d at 1316. Rather than
 15 spelling out the steps that he took from the data to his damages’ opinion, Mr.
 16 Thomas’s methodology is “written in invisible ink.” *See Open Text S.A.*, 2015 WL
 17 349197, at *6. Mr. Thomas’s method is a “black box into which data is fed at one end
 18 and from which an answer emerges at the other,’ and the jury cannot see how the
 19 pieces fit together or how the data drives the conclusion.” *Id.* Without an explanation
 20 for his selecting and de-selecting certain transactions, Mr. Thomas’s opinion is noth-
 21 ing more than *ipse dixit* and should be excluded as unreliable. *See Gen. Elec. Co.*, 522
 22 U.S. at 137.

23 Mr. Thomas also relied on these 14 transactions to derive the revenue multi-
 24 plier of [REDACTED], and multiplied against Social-Engineer’s revenue of [REDACTED] to cal-
 25 culate the lost business value of \$1,692,000. Expert Report ¶ 27. Yet, the Report does
 26 not describe how he selected a revenue multiple of [REDACTED] based on the selected fourteen

1 transactions, nor does it present the data Mr. Thomas used to calculate the transaction
 2 revenue multiples. *See id.* Mr. Thomas also concedes that [REDACTED] is not the accurate
 3 multiple to reach his calculation of \$1,692,000:

4 Q. I am not great at math, but I did the equation in Paragraph 27 of your report, [REDACTED] and I did not get 1692. I got 1644,
 5 so what am I doing wrong in my equation?

6 A. The multiples I provided, if you – you know, if you look at them, the actual multiple is [REDACTED], and that would get you there.

7 Q. So why didn't you put [REDACTED] – whatever it is you said in your equation in Paragraph 27?

8 . . .

9 Q. So you used [REDACTED] just for the sake of presentation when you wrote Paragraph 27?

10 A. Correct.

11 Thomas Dep. 136:17–137:21.

12 “[A]ny step that renders [the expert's] analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.” *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1154 (E.D. Wash. 2009) (quoting *In re Silicone Gel Breast Implants Products Liability Litig.*, 318 F. Supp. 2d 879, 890 (C.D. Cal. 2004)). Mr. Thomas cannot merely select fourteen transactions, rejecting other undisclosed transactions, without any apparent criteria or explanation. This first misstep renders his whole testimony on lost business value unreliable. However, the unreliability does not stop there. Mr. Thomas then uses these fourteen transactions to derive a multiple of [REDACTED], without providing any data to support that number. And, in fact, that multiple is not accurate and would result in a lost business value of \$1,644,000, not \$1,692,000, as claimed by Mr. Thomas. Thomas Dep. 136:17–137:21.

1 Each step of Mr. Thomas's analysis misapplies the methodology and undermines the
 2 reliability of his opinion.

3 **c. Mr. Thomas has no basis for assuming that Social-**
 4 **Engineer was entirely destroyed.**

5 Mr. Thomas calculates the loss of business value at \$1,692,000 by assuming—
 6 without any factual or evidentiary support—that Social-Engineer has **zero** value af-
 7 ter the Transparency Report. In other words, Mr. Thomas assumes that that the
 Transparency Report destroyed Social-Engineer:

8 Q. And in assessing your damages, you essentially put the value of the
 9 business today at zero to give Mr. Hadnagy all 1.692 million; correct?

10 A. Right. This would be under the scenario that the business does go
 11 down.

12 Q. Okay. What if the business doesn't go down?

13 A. Then that number could change.

14 ...

15 Q. What's the value of the business today?

16 A. I haven't done a valuation of the business today. You know, we're as-
 17 suming under this premise that the value would be zero. It would go
 18 away. The business would be lost.

19 Thomas Dep. 128:14–129:21. Not only is Mr. Thomas's assumption again *ipse dixit*,
 20 but it is also contrary to the factual record. Social Engineer's annual revenue **in-**
 21 **creased** [REDACTED] (pre-damages period) in 2021 to [REDACTED] (during
 22 the alleged damages period) in 2022. See Expert Report at Schedule 2 [REDACTED]
 23 [REDACTED]. Social-Engineer also reported annual revenues of [REDACTED] in 2023.

24 Id. The undisputed factual record of Social-Engineer's revenues in the two years fol-
 25 lowing the Transparency Report **completely undermines** Mr. Thomas's assumption
 26 that Social-Engineer lost 100% of its value. His conclusion flagrantly violates Rule
 702(b)'s requirement that his analysis be "based on sufficient facts or data."

1 **2. Mr. Thomas's calculations for lost income are unreliable.**

2 **a. Mr. Thomas fails to apply accepted economic
 standards for his loss of income calculation.**

3 In determining reliability, a court may consider a number of factors including
 4 whether the theory or methodology employed is generally accepted in the relevant
 5 scientific community. *Daubert*, 509 U.S. at 593–94. There are “four commonly ac-
 6 cepted methods financial experts use to gather evidence to support and estimate lost
 7 revenues”: (1) the before-and-after method, (2) the yardstick method, (3) the sales
 8 projection method, and (4) the market model. JAMES S. PAPPAS, WILLIAM SCALLY, AND
 9 STEVEN M. VEENEMA, THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES 208 (7th
 10 ed. 2023); *see also Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 667 (5th Cir. 1974) (dis-
 11 cussing the before-and-after method and the yardstick method); *Architectural Inge-
 12 nieria Siglo XXI, LLC v. Dominican Republic*, No. 20-14058, 2023 WL 8946765, at
 13 *10 (11th Cir. Dec. 28, 2023) (same). Mr. Thomas does not identify, explain, or adopt
 14 **any** of these accepted methods to calculate Hadnagy’s alleged loss of income.

15 **b. Mr. Thomas fails to account for increased operating
 expenses.**

16 Mr. Thomas fails to explain Social-Engineer’s increased operating expenses, or
 17 how these are supposedly attributable to Defendants’ Transparency Report or Trans-
 18 parency Update. Damages for loss of income are intended to compensate for the net
 19 income that would have been earned *but-for* Defendants’ conduct. But including So-
 20 cial-Engineer’s increased operating expenses—without any support for how **Defend-**
 21 **ants** caused these increases—distorts the alleged economic damages of the Trans-
 22 parency Report and allows Hadnagy to recover for costs incurred in the normal course
 23 of business.

24 Between 2021 and 2022, for example, the expenses listed under the label [REDACTED]
 25 [REDACTED] at Social-Engineer increased from [REDACTED]. Expert Report at
 26

1 Schedule 2. The [REDACTED] then decreased to [REDACTED] in 2023. *Id.* Mr. Thomas
 2 fails to explain what these expenses were for, how they are connected to the Transparency
 3 Report, and whether these expenses could have been avoided. The same is
 4 true for the expenses labeled [REDACTED]. Between 2021 and 2022, these ex-
 5 penses increased [REDACTED] [REDACTED]. *Id.* The [REDACTED]
 6 then decreased to [REDACTED] in 2023. *Id.* A similar jump in operating expenses occurs under
 7 the label [REDACTED]. Between 2021 and 2022, these expenses
 8 skyrocketed from [REDACTED]. *Id.*

9 For these increased operating expenses—which Mr. Thomas included as a com-
 10 ponent of Hadnagy’s loss of income—Mr. Thomas fails to explain what these expenses
 11 were for, why they increased, and how they supposedly relate to the Transparency
 12 Report. When pressed at his deposition, Mr. Thomas testified that he just ***assumes***
 13 that the increases in operating expenses flow from the Transparency Report.

14 Q. And all the increases in operating expenses, those are all tied to Def
 Con?

15 A. So the way that I look at this is that, yeah, the business was performing
 16 profitably prior to the issuance of the releases of the transparency report
 17 and the update. My understanding in talking to Mr. Hadnagy, is that,
 18 yes, they had to increase certain expenses to try to maintain their busi-
 ness operations and to continue operating as best they could given the
 19 loss of contracts, the inability for extensions, as well as some of their
 20 more profitable work like speeches and things like that were -- he was
 21 not able to generate those activities like he had been in the past.

22 . . .

23 Q. And what are these consulting fees?

24 A. I don’t know the specifics behind the consulting fees.

25 . . .

26 Q. And sitting here today, can you tell me how they actually increased be-
 cause of Def Con or Mr. Moss?

A. Same answer there. I don’t know the specifics of the increase.

. . .

1 Q. Going to the meal-business, did Social-Engineer, Mr. Hadnagy just get
 2 hungrier in 2022 because of Def Con and Mr. Moss or what are those
 3 expenses?
 4 . . .
 5 A. Again, I'm making the assumption that it's tied back to the issuance of
 6 the transparency report.

7 Thomas Dep. 70:4–75:8. Mr. Thomas assumes with ***no factual basis*** that these in-
 8 creased operating expenses were a direct result of Defendants' Transparency Report
 9 and includes them as part of Hadnagy's loss of income.

10 c. **Mr. Thomas's calculations assume round numbers.**

11 Mr. Thomas's calculations for loss of income are unreliable for yet another rea-
 12 son: he does not apply any scientific or mathematical methodology for his estimation
 13 of Hadnagy's income for the years prior to the Transparency Report. Specifically, Mr.
 14 Thomas simply ***rounds up*** to the nearest round number, rather than taking the av-
 15 erage of Hadnagy's historical income.

16 Q. So let's stop there, 2020 and 2021. You – you say because he made [REDACTED]
 17 and [REDACTED] in 2020 and 2021, that he makes [REDACTED] a year for your but for
 18 analysis; right?

19 A. Correct.

20 Q. But you didn't average those numbers; correct?

21 A. I did not average them, no.

22 Q. If you averaged them, it would be about [REDACTED]; fair?

23 A. Which would round to [REDACTED].

24 Q. So you're kind of using, like, the – for lack of a better term, like "thumb
 25 to the tongue, this sounds about right, [REDACTED]," to come up with that but for
 26 number; right?

A. I'm not, no. I mean, you're right that the average is [REDACTED]

. . .

Q. By why not the average? Why not the historical average? Why just [REDACTED]
 Is it because it was a round number?

A. Again, I rounded to [REDACTED]

1 Thomas Dep. 105:6–106:10. As explained above, any step that renders the expert's
 2 analysis unreliable renders the expert's testimony inadmissible. *Henricksen*, 605 F.
 3 Supp. 2d at 1154. Mr. Thomas cannot round up for the sake of convenience, inflating
 4 Hadnagy's damages. This step misapplies the methodology and undermines the reli-
 5 ability of his testimony. *See id.*

6 **d. Mr. Thomas's calculations include income from**
 7 **January 2022, before the Transparency Report.**

8 Mr. Thomas calculates Hadnagy's total damages for all of 2022, including
 9 January 2022, but Defendants did not issue the Transparency Report until **Febru-**
 10 **ary** 2022. Mr. Thomas provided inconsistent testimony on this deficiency:

11 Q. Your damages analysis that you provided in this report does not in-
 clude damages from January 1st to February 9, 2022; correct?

12 A. Correct, yes. That first period, right.

13 Q. Because damages during that time frame would be improper; right?

14 A. It would've been prior to the issuance of the February 9, 2022, report.

15 Q. Got it.

16 Thomas Dep. 20:15–23. However, later in his deposition, Mr. Thomas walked back
 17 that statement, admitting that the calculations for 2022 included Hadnagy's income
 18 for the entire year, including January 1, 2022 to February 9, 2022:

19 Q. In 2022, going back to your chart in Paragraph 20, you did but for in-
 come for the entire year, January 1st to December 31, 2022. It
 would've been [REDACTED] You said he had an actual loss of [REDACTED], so that
 gives you a lost income of [REDACTED] correct?

20 A. Correct.

21 Q. And that is essentially the [REDACTED] plus the [REDACTED] that's the loss that
 gives you that [REDACTED]

22 A. It is.

23 Q. Okay. So that includes damages from January 1, 2022, to February 10,
 2022; correct?

1 A. I don't necessarily see it that way. I mean, it's not abnormal to say, you
 2 know, that an individual is impacted at some point in 2022 and we're
 3 going to look at the full year of but for earnings less actual to arrive at
 4 the damages.

5 Q. You didn't do any formula to say, Well, here's what it was for the en-
 6 tire year. Let's go for however many days is in the year to kind of break
 7 it down from that February 9th going forward?

8 A. I did not do that.

9 Thomas Dep. 117:23–118:18.

10 Mr. Thomas's opinion improperly includes January 1, 2022, to February 9,
 11 2022, as part of the damages period and is unreliable as a result.

12 **e. Mr. Thomas's calculations include unrecoverable
 13 costs, such as attorneys' fees.**

14 Mr. Thomas's opinion is also unreliable because his calculation of Hadnagy's
 15 loss of income includes expenses for professional fees, such as attorneys' fees, which
 16 are not recoverable as damages in a private lawsuit. The Report provides that "in-
 17 cluded in the foregoing lost income amount is [REDACTED] in professional fees." Expert
 18 Report ¶ 21. Mr. Thomas admits that the "professional fees" are attorneys' fees in and
 19 concedes that he does not know if those fees are recoverable as a matter of law.

20 Q. What do you mean by professional fees?

21 A. Right. The way I look at that or the way that I view that is those are the
 22 increased legal fees.

23 ...

24 Q. Okay. So you are aware of the American rule for recovery of attorneys'
 25 fees or legal extensions?

26 A. Not the specifics, no.

27 Q. Do you know when attorneys' fees are recoverable as a matter of law?

28 A. Again, I don't know the specifics.

29 Q. So you – sitting here today, you don't know whether legally attorneys'
 30 fees are recoverable as damages; correct?

31 A. Again, I don't know the specifics.

1 Thomas Dep. 91:13–18, 68:1–15. Under Washington law, attorneys' fees are not re-
 2 coverable in a private defamation suit. *See Moe v. Wise*, 97 Wash. App. 950, 971
 3 (1999). Accordingly, Mr. Thomas's opinion regarding the amount of lost income is un-
 4 reliable because it includes expenses, such as attorneys' fees, that are not recoverable
 5 as a matter of law.

6 **f. Mr. Thomas's calculations include unrelated
 7 income.**

8 Mr. Thomas's opinion is also unreliable because he includes income that is un-
 9 related to the litigation to calculate Hadnagy's loss of income. First, Mr. Thomas fails
 10 to exclude the income earned by Hadnagy's wife, Areesa Hadnagy, when calculating
 Hadnagy's loss of income.

11 Q. So Ms. Hadnagy's income – or the expenses for Ms. Hadnagy in running
 12 Social-Engineer also are included in the income that Mr. Hadnagy
 13 makes?

14 A. It would be the overall income that's generated on his 1040, yes, from
 the business.

15 Q. Got it. So Mr. Hadnagy's [REDACTED] in income for Mr. Hadnagy's reputa-
 16 tion includes the amounts that his wife makes as a salaried employee
 for Social-Engineer.

17 A. Historically, *they've* been able to generate [REDACTED], and
 18 [REDACTED] on average in the form of wages, business income, and that has
 19 been interrupted post-loss event due to the fact that *they've* had the
 issue of the transparency report and the activity level inclusive of that
 has gone down and had losses in '22 and '23.

20 Thomas Dep. 103:11–104:1. Yet, Ms. Hadnagy is not a plaintiff, and there is no alle-
 21 gation that the Transparency Report injured her. In fact, Ms. Hadnagy's W-2s show
 22 that her salary increased by [REDACTED] in 2021 to [REDACTED] in 2023. Mr.
 23 Thomas fails to explain why he included Ms. Hadnagy's income from Social-Engi-
 24 neer—which increased during the damages period—in his calculations for Mr.
 25 Hadnagy's alleged loss of income.

1 Mr. Thomas also includes income generated by Hadnagy from SEVillage LLC,
 2 an unrelated entity, when calculating Hadnagy's loss of income.

3 Q. So is it fair to say that the income for Social-Engineer in 2020 is com-
 4 prised of business income from Social-Engineer, LLC and SEVillage
 5 LLC?

6 A. Correct.

7 Thomas Dep. 94:12–15. Again, SEVillage is not a party, and Hadnagy cannot boot-
 8 strap income he allegedly lost from an unrelated, nonparty entity to bolster his al-
 9 leged losses from Social-Engineer.

10 **3. Mr. Thomas "double dips" for both lost income and
 11 business value.**

12 Mr. Thomas impermissibly double-counts the damages for lost business value
 13 to Social-Engineer and lost income to Hadnagy. Mr. Thomas's calculations for alleged
 14 lost business value include (i) Social-Engineer's future net cash flows to both debt and
 15 equity holders in 2022 and 2023, and (ii) Social-Engineer's net income to equity hold-
 16 ers in 2022 and 2023. See Expert Report ¶¶ 24–27 and Schedule 2. However, Mr.
 17 Thomas also includes Social-Engineer's net income as part of Hadnagy's alleged lost
 18 income. Since the alleged lost business value includes the value of Social-Engineer's
 19 future net cash flows to both debt and equity holders in 2022 and 2023, and also
 20 incorporates the alleged lost income that includes Social-Engineer's net income to
 21 equity holders in 2022 and 2023, the calculations double count damages in 2022 and
 22 2023. Hadnagy cannot recover both lost business value and lost income, as it would
 23 constitute double recovery. See, e.g., *Herrington v. Sonoma Cnty.*, 834 F.2d 1488, 1506
 24 (9th Cir. 1987) (holding plaintiffs could not "obtain compensation for both lost value
 25 and lost profit" because it would constitute "double recovery"); *Johnson v. Oroweat*
 26 *Foods Co.*, 785 F.2d 503, 508 (4th Cir. 1986) ("[T]he two methods of calculation—
 present value of all future earning or market value of the business—are simply

1 alternative methods of measuring the extent of the same injury. That is why courts
 2 allow a plaintiff to recover either the present value of lost future earnings or the pre-
 3 sent market value of the lost business, but not both."); *Am. Anodco, Inc. v. Reynolds*
 4 *Metals Co.*, 743 F.2d 417, 424 (6th Cir. 1984) ("Where the loss of profits and loss of
 5 value are intertwined, as they are here, and the loss of value is based on loss of future
 6 profits, to allow both would be to permit a double recovery.").

7 The Comprehensive Guide to Economic Damages, a leading treatise on eco-
 8 nomic experts' damages calculations and methods, further confirms that recovery for
 9 both lost profits and lost value is barred as double recovery: "A business damages
 10 claim may be properly calculated as either the lost profits of the business or the lost
 11 value of the business. Courts have stated the general rule permitting the alternate
 12 theories of recovery as follows:

13 [I]f a business is completely destroyed, [then] the proper total measure
 14 of damages is the market value of the business on the date of the loss. If
 15 the business is not completely destroyed, then it may recover lost profits.
 A business may not recover both lost profits and the market value of the
 business.

16 PAPPAS ET AL., THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES at 265. Mr.
 17 Thomas's opinions are unreliable because he seeks to permit recovery for the same
 18 damages, which constitutes double recovery, and should therefore be excluded.
 19

20 **B. Mr. Thomas's Opinions Are Not Based on Sufficient Facts.**

21 **1. Mr. Thomas relies on a client-prepared spreadsheet.**

22 Courts in this Circuit warn against the danger of providing client-prepared
 23 information to an expert. *See, e.g., Therasense, Inc. v. Becton, Dickinson and Co.*, 2008
 24 WL 2323856, at *2 (N.D. Cal. May 22, 2008); *Geo. M. Martin Co. v. All. Mach. Sys.*
 25 *Int'l, LLC*, No. C 07-00692 WHA, 2008 WL 2008638, at *1 (N.D. Cal. May 6, 2008).
 26 "One of the worst abuses in civil litigation is the attempted spoon-feeding of client-

1 prepared and lawyer-orchestrated ‘facts’ to a hired expert who then ‘relies’ on the
 2 information to express an opinion.” *Therasense*, 2008 WL 232856, at *1.

3 Mr. Thomas’s opinions are unsound for that very reason. Despite asserting
 4 that Hadnagy lost contracts because of the Transparency Report, Mr. Thomas did not
 5 review *any* of the underlying contracts with Hadnagy’s customers or *any* of the state-
 6 ments of work sent to Hadnagy’s potential customers. Rather, Mr. Thomas relied
 7 *solely* on a spreadsheet ***created by Hadnagy himself***.

8 Q. You didn’t review any of Mr. Hadnagy’s contracts or potential contracts
 9 prior to 2022; correct?

10 A. I have a list of contracts that allegedly have been impacted by the
 events, and some of them start prior to February 2022.

11 Q. Well, my question is different. My question wasn’t whether you had a
 12 list of alleged contracts. My question is whether prior to February 9,
 13 2022, you, yourself, analyzed any contracts or potential contracts Mr.
 Hadnagy had or Social-Engineering had with respect to his business.

14 A. Again, I’ve reviewed that spreadsheet that details out certain contracts
 15 and certain contracts that were impacted, and those contracts began
 prior to February 2022.

16 . . .

17 Q. Who prepared this document?

18 A. My understanding, it was Mr. Hadnagy who prepared this.

19 . . .

20 Q. So just to clarify, you have not reviewed any of the contracts listed in
 this document; correct?

21 A. Again, I have not reviewed the specific contracts as of –

22 Q. All that you’ve reviewed is this document that lists contracts; correct?

23 A. Correct. These are the contracts that I have been able to get a summary
 of and under -- - have an understanding of how contracts come and go.

24 . . .

25 Q. And going to the column for SOW, you don’t know – you haven’t reviewed
 any of the SOWs referenced in this report; correct?

26 A. I have not.

1 Thomas Dep. 22:7–25:15, 50:8–11. Given that Mr. Thomas did not independently re-
 2 view the contracts for Hadnagy’s customers and the statements of work for Hadnagy’s
 3 potential customers, Mr. Thomas could not confirm the accuracy of Hadnagy’s data.
 4 For expert testimony to be admissible, the expert “must be able to explain how he
 5 applied his particular knowledge or experience, using reliable methods applied to
 6 particularized facts, to come to his conclusions.” *Campagnolo S.r.l. v. Full Speed*
 7 *Ahead, Inc.*, 2010 WL 11527323, at *3 (W.D. Wash. May 5, 2010). Mr. Thomas fails
 8 to demonstrate how he applied his methodology to particularized facts.

9 **2. Mr. Thomas’s testimony assumes causation and is wholly**
useless to a jury.

10 Mr. Thomas’s Report asserts that Hadnagy suffered economic damages “due to
 11 *the actions of the Defendants*, such as the release of the Transparency Report on Feb-
 12 ruary 9, 2022 and subsequent Update released on January 13, 2023.” Expert Report
 13 ¶ 4 (emphasis added). Yet, Mr. Thomas admits that he (1) does not know why Social-
 14 Engineer gained or lost contracts between 2017 and 2024, and (2) **assumes** causation
 15 for the purposes of his calculations:

16 Q. And what do you mean by assuming liability?

17 A. My report and the calculations in my report and my schedules are based
 18 on the premise that liability would be found against the defendants and
 19 that has caused the economic harm.

20 Q. Okay. Did you do any independent analysis to determine whether any
 21 of the alleged conduct actually did cause harm to Mr. Hadnagy?

22 A. Right. So that’s where -- as a financial expert, it’s not my role to deter-
 23 mine the liability in a case, but I can see from -- that there is a link
 24 between the time -- the time frame of when the events occurred and the
 25 negative financial performance of the business.

26 . . .

27 Q. You don’t actually know why contracts were gained or lost from 2017
 28 to 2024; correct?

1 A. Specifically, gained or lost, correct. I don't know the exact underpinnings
 2 of why a contract is – stays or leaves specifically, but I can tell from the
 3 financial performance that they had positive growth prior to the loss
 4 event.

5 Thomas Dep. 21:6–18, 29:7–14. Mr. Thomas nonetheless asserts that the alleged
 6 damages he calculated were “due to the actions of Defendants.” Expert Report ¶¶ 4,
 7 28. Mr. Thomas’s expert testimony should be excluded as wholly speculative as to
 8 causation.

9 For example, in *Grasshopper House, LLC v. Clean and Sober Media LLC*, the
 10 damages expert claimed that he “did not seek to opine on the issue of causation” by
 11 “assuming the facts of [defendant’s] liability for the purposes of his analysis,” yet per-
 12 formed a “but-for” analysis to “resolve the question of what damages were ‘caused’
 13 by” defendant. 2019 WL 12074086, at *11 (C.D. Cal. July 1, 2019). The court held
 14 that the expert “transformed what otherwise could have been a mere damages esti-
 15 mate based on assumed facts provided by the client . . . into a fulsome expert opinion
 16 as to the actual causes of [plaintiff’s] damages.” *Id.* at *12. The court also found that
 17 “an analysis of damages *without* proving those damages were caused by the defen-
 18 dant’s allegedly illegal conduct would be wholly useless to the jury.” *Id.*

19 The same is true here. Although Mr. Thomas claims to assume liability and
 20 not to opine on causation, his Report does just that by repeatedly concluding that
 21 Hadnagy suffered economic damages “***due to the actions of the Defendants***, such
 22 as the release of the Transparency Report on February 9, 2022 and subsequent Up-
 23 date released on January 13, 2023.” Expert Report ¶ 28 (emphasis added). Even if
 24 Mr. Thomas’s expert testimony was limited to simply damages, the expert testimony
 25 would still be “wholly useless to the jury” because it fails to establish a causal link
 26 between the Transparency Report and Hadnagy’s purported economic damages. *See*
Grasshopper House, LLC, 2019 WL 12074086, at *12.

1 **3. Mr. Thomas does not consider alternative explanations.**

2 The court may exclude expert testimony where “an expert has unjustifiably
 3 extrapolated from an accepted premise to an unfounded conclusion” or where an ex-
 4 pert fails to “account[] for obvious alternative explanations.” *Pooshs v. Phillip Morris*
 5 *USA, Inc.*, 287 F.R.D. 543, 546 (N.D. Cal. 2012); *see also Grasshopper House, LLC*,
 6 2019 WL 12074086, at *12 (excluding expert testimony where expert failed to “con-
 7 sider these other factors of reputational harm to [plaintiff] in his expert report”). “An
 8 expert opinion is properly excluded where it relies on an assumption that is unsup-
 9 ported by evidence in the record and is not sufficiently founded on facts.” *Nuveen*
 10 *Quality Income Mun. Fund Inc. v. Prudential Equity Grp., LLC*, 262 Fed. Appx. 822,
 11 824 (9th Cir. 2008).

12 Mr. Thomas relies on a Hadnagy-provided assumption that Defendants caused
 13 Hadnagy’s financial harm without doing **anything** to vet the accuracy of this as-
 14 sumption:

15 Q. And contracts could have been lost by Mr. Hadnagy for a multitude of
 16 reasons; right?

17 A. Hypothetically.

18 ...

19 Q. And, again, you didn’t perform an independent analysis to determine
 20 the cause of Mr. Hadnagy either gaining or losing a contract from 2017
 21 to 2024; correct?

22 A. Again, I feel like I’ve answered this. I don’t know the exact underpin-
 23 nings of why one contract’s going to come and go, but I do know that the
 24 company had the ability to continue operating and to grow its business
 25 and increase its revenue.

26 ...

27 Q. Or it could just be because they – the other person had a better contract;
 28 right?

29 A. Hypothetically, right.

1 Thomas Dep. 29:15–30:23, 59:5–8. Mr. Thomas’s opinion does not investigate or con-
 2 sider alternative explanations for why Hadnagy failed to obtain certain business con-
 3 tracts after the Transparency Report.

4 The Report also ignores facts that did not support the assumptions Hadnagy
 5 fed him. *See In re Bextra & Celebrex Mktg. Sales Pracs. & Prod. Liab. Litig.*, 524 F.
 6 Supp. 2d 1166, 1176, 1184 (N.D. Cal. 2007) (excluding expert who “cherry-pick[ed]
 7 observational studies that support his conclusion and reject[ed] or ignor[ed] the great
 8 weight of the evidence that contradicts his conclusions”); *see also* Fed. R. Evid. 702,
 9 Advisory Comm. to 2000 Amendments (listing as a factor for determining reliability
 10 “[w]hether the expert has adequately accounted for obvious alternative explana-
 11 tions”).

12 Column E of the spreadsheet prepared by Hadnagy indicates the “Loss Reason”
 13 for each contract. *See* Mertens Decl. Exhibit C. The spreadsheet lists [REDACTED] contracts
 14 were not entered into because “[REDACTED],” [REDACTED] contracts were not
 15 entered into because “[REDACTED],” [REDACTED] contracts were “[REDACTED],”
 16 another [REDACTED] contracts were lost due to “[REDACTED],” [REDACTED] contracts were
 17 not entered into because of “[REDACTED] and [REDACTED] contracts were not entered into because
 18 of “[REDACTED].” *Id.* When asked what [REDACTED] means, Mr. Thomas could not provide an expla-
 19 nation. Thomas Dep. 50:17–19 (“I do not know what the [REDACTED] stands for.”). There is not a
 20 single entry on the spreadsheet in Column E indicating that the Transparency Report
 21 caused the loss.

22 But Mr. Thomas ignores these explanations from his client, instead insisting
 23 that the Transparency Report caused each and every lost contract. This is indefensi-
 24 ble. *See Chung v. Washington Interscholastic Actives Ass’n*, 2021 WL 1978698, at *3
 25 (W.D. Wash. May 18, 2021) (excluding expert “[b]ecause the Report’s underlying as-
 26 sumptions lack a factual basis in the record”).

V. CONCLUSION

The Court should exclude Hadnagy's damages expert, Mr. Ben Thomas, for deficiencies under Rule 702. I certify that this memorandum contains 6,294 words, in compliance with the Local Civil Rules.

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